

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 738.

WAGNER ELECTRIC COMPANY, APPELLANT,

vs.

**LAMAR LYNDON AND CHARLES E. MOHRSTADT,
SHERIFF OF THE CITY OF ST. LOUIS.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF MISSOURI.**

FILED DECEMBER 16, 1922.

(29,288)



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(a)

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1922, of said Court, before the Honorable John E. Carland, Circuit Judge, and the Honorable Jacob Trieber and the Honorable Thomas C. Munger, District Judges.

Attest: [Seal of United States Circuit Court of Appeals, Eighth Circuit.] E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the fifteenth day of December, A. D. 1921, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Wagner Electric Manufacturing Company was Appellant, and Lamar Lyndon, et al., were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:



1 (Citation and Acknowledgment of Service.)

The United States of America, to Lamar Lyndon and
Charles E. Mohrstadt, Sheriff of the City of St.
Louis,—Greeting:

You are hereby cited and admonished to be and appear in
the United States Circuit Court of Appeals, Eighth Circuit, at
St. Louis, Missouri, sixty days from and after the day this
Citation bears date, pursuant to an appeal filed in the Clerk's
office of the Circuit Court of the United States for the Eastern
Division of the Eastern Judicial District of Missouri, wherein
Wagner Electric Manufacturing Company is appellant and
you are appellees, to show cause, if any there be, why the judg-
ment rendered against the said appellant, should not be cor-
rected, and why speedy justice should not be done the parties
in that behalf.

Witness, the Honorable C. B. Faris, Judge of the Circuit
Courts of the United States for the Eastern District of
Missouri, this 12th day of October in the year of our
Lord one thousand nine hundred and twenty-one.

C. B. FARIS,
United States District Judge,
For the Eastern District of
Missouri.

Service of a copy of the above is hereby acknowledged this
24 day of October, 1921.

CLARENCE T. CASE,
Attorney for defendant Charles
E. Mohrstadt, Sheriff etc.

2 United States of America
Eastern Division of the Eastern
Judicial District of Missouri—ss.

Be It Remembered, that heretofore, to-wit: on the 8th day of June, A. D. 1921, there was filed in the office of the Clerk of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri, a bill of complaint wherein Wagner Electric Manufacturing Company, a corporation, is Plaintiff, and Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, are defendants, which bill is in words and figures as follows, to-wit:

Petition.

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Wagner Electric Manufacturing Company, a corporation,
Plaintiff,

vs.

Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, Defendants.

1. Plaintiff is a corporation organized, existing and doing business under the laws of the State of Missouri, with its principal place of business in the City of St. Louis, State of Missouri, and in the Eastern Division of the Eastern District of Missouri, of which said state, and of no other, it is a citizen, and of which said division and district it is a resident.

2. The defendant Lamar Lyndon is a citizen and resident of the State of New York(and is not a citizen of and does not reside within the State of Missouri.

3 The defendant Charles E. Mohrstadt is a citizen and resident of the State of Missouri and of the Eastern Division of the Eastern District thereof.

4. This is a suit of a civil nature, brought for the purpose of establishing a trust in plaintiff's favor in and to a certain fund of \$15,015.29, now in the possession of defendant Charles E. Mohrstadt, Sheriff as aforesaid, and in and to which the defendant Lamar Lyndon claims an interest, and to enjoin the delivery of said fund to the defendant Lyndon, and to require the payment of said fund to the plaintiff herein, which said fund was coerced and taken from the plaintiff herein

through and under a certain judgment made and entered by the Circuit Court of the City of St. Louis, Missouri, on the 4th day of December, 1917 against the plaintiff herein and in favor of the defendant Lamar Lyndon, and in and through an execution issued by the Circuit Court of the City of St. Louis, Missouri, under said judgment, directed to the defendant Charles E. Mohrstadt, as Sheriff, which said judgment was so made and entered, and which said execution was so executed against the plaintiff herein in violation of those provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which prohibit the states from depriving any person of property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws.

5. Plaintiff states that heretofore, to-wit, on the 10th day of May, 1917 defendant Lamar Lyndon instituted a suit against plaintiff in the Circuit Court of the City of St. Louis, Missouri, by filing therein a petition in word and figures as follows:

"Comes now the plaintiff and states that the defendant, Wagner Electric Manufacturing Company, is a corporation organized and existing under and by virtue of the laws of the State of Missouri, having its principal office in the City of St. Louis and State of Missouri.

For his cause of action plaintiff states that he is the original and sole inventor of certain improvements in Devices for Re-charging the Storage Batteries of Automobiles; that on the 20th day of April, 1906, letters patent of the United States No. 815,360 was issued to him wherein and whereby there was

granted to him, his heirs, and [and] assigns, for the full term of seventeen years from said date, the exclusive right to make, use and vend the invention disclosed and claimed in said letters patent; that he continued to be and was the owner of said letters patent on the 2nd day of March, 1912, and was on said date in sole enjoyment of all rights, granted under said letters patent; that on the 2nd day of March, 1912, the plaintiff and defendant entered into an agreement in writing wherein and whereby the defendant was granted and obtained the right to elect between the privilege of purchasing outright the patent hereinbefore referred to, or operating thereunder under an exclusive license.

That the defendant in and by said contract agreed in the event that it elected to operate under an exclusive license, to pay for the third year thereafter, commencing March 2, 1914, and each year thereafter, for the rights under said patent a minimum royalty of \$3,000.00 per year, said royalty to be paid in advance one-half in January and the remaining one-half in July of each year, respectively; that thereafter defendant, pursuant to the terms of said contract elected to operate under an exclusive license and that in pursuance of said contract the plaintiff by an instrument in writing dated, executed and delivered to defendant on the 16th day of April, 1912, assigned and transferred to the defendant all the right, title and interest in and to the letters patent above referred to, subject to the payment of royalty provided by said contract, the same to be held and enjoyed by the defendant as fully and entirely as the same would have been held and enjoyed by the plaintiff had the assignment and license not been made; that the defendant caused said instrument to be recorded in the Patent Office of the United States on the 22nd day of April, 1912 in Book N. 89, at page 303; that in and by said instrument the defendant was vested with the entire legal and equitable title to the letters patent aforesaid and to the exclusive right to make, use and vend the invention covered by said letters patent, and that the plaintiff has been deprived of any rights under and by virtue of said patent; that the defendant has continued to hold and does now hold the full enjoyment of all rights under and by virtue of said patent, and has excluded plaintiff from any possession or enjoyment thereof whatsoever.

That under and by virtue of the contract of March 2, 1912, above referred to, the defendant became indebted to the plaintiff on account of a minimum royalty or license fee on January 1, 1914, in the sum of One Thousand Five Hundred Dollars (\$1,500.00); on July 1st, 1914, in the sum of One Thousand Five Hundred Dollars (\$1,500.00); on January 1, 1915, in the sum of One Thousand Five Hundred Dollars (\$1,500.00); on July 1, 1915, in the sum of One Thousand Five Hundred Dollars (\$1,500.00); on January 1, 1916 in the sum of One Thousand Five Hundred Dollars (\$1,500.00); on July 1, 1916, in the sum of One Thousand Five Hundred Dollars (\$1,500.00) and on January 1, 1917, in the sum of One Thousand Five Hundred Dollars (\$1,500.00), making a total indebtedness of

Ten Thousand Five Hundred Dollars (\$10,500.00) due and payable, at the commencement of this action.

5 That the plaintiff has fully complied with the terms of the contract on his part and that he has demanded the payment of the royalty due under said contract, but that no part thereof has been paid.

Wherefore, Plaintiff prays judgment against the defendant in the sum of Ten Thousand Five Hundred Dollars (\$10,500.00) with interest from the date that the installments thereof above set forth became due and payable, and for the costs of this action.

RIPPEY & KINGSLAND
Attorneys for Plaintiff."

Upon said petition a summons was issued to and served upon the plaintiff, and in due course plaintiff filed its answer to said petition, which said answer was in words and figures as follows:

"Comes now Wagner Electric Manufacturing Company a corporation, defendant in the above entitled cause, and for its answer to the petition filed by plaintiff in said cause denies each and every allegation in said petition contained.

And having fully answered, the defendant prays to be hence dismissed with its costs.

CHAS. A. HOUTS,
Attorney for Defendant."

And afterwards plaintiff filed an amended answer to said petition, which was in words and figures as follows:

"Comes now Wagner Electric Manufacturing Company, a corporation, defendant in the above entitled cause, and by leave of Court files this its amended answer to the petition herein, and for such answer denies each and every allegation in the petition contained.

Defendant further answering says that on or about the 9th day of November, 1912, defendant notified plaintiff in writing of its desire and decision to terminate the agreement between plaintiff and defendant, and thereafter, and from said date, defendant has claimed to plaintiff that said contract was at all times after said 9th day of November, 1912, terminated and no longer in force. On which claim plaintiff has, from time to time since that date, been duly informed.

Wherefore, having fully answered, defendant asks to be hence dismissed with its costs.

CHARLES A. HOUTS,
Attorney for Defendant."

6 In due time the defendant filed his reply to said amended answer in words and figures as follows:

"Comes now plaintiff in the above entitled cause and by leave of Court files this his reply to the amended answer of defendant, and for reply to the new matter set up in said amended answer denies each and every allegation thereof and prays for judgment in accordance with the prayer of the petition.

RIPPEY & KINGSLAND,
Attorneys for Plaintiff."

6. Plaintiff says that said petition, said answer and said reply were the only pleadings filed in said cause by the parties thereto; that they were in accordance with the Statutes of the State of Missouri prescribing the manner, method and form of instituting suits at law of the kind thereby instituted, and the procedure to be followed in defining the issues to be decided before a judgment could be entered for or against either of the parties to said cause; and that under the laws of the State of Missouri no issues, other than those raised by the pleadings, could be considered and determined by said Court in arriving at the judgment to be entered in said cause.

7. Plaintiff shows the Court that in and by said petition defendant Lyndon alleged and charged that plaintiff and defendant Lyndon had entered into a contract, whereby defendant Lyndon had granted unto plaintiff the right to elect between the privilege of purchasing outright a certain patent in said contract and in said petition described, or operating thereunder under an exclusive license; that plaintiff had elected to operate under an exclusive license, and had thereby become obligated to the defendant Lyndon for the payment of certain royalties, amounting to \$10,500.00, which by said suit, defendant Lyndon sought to recover. Plaintiff by its answer aforesaid denied that it had elected to operate under an exclusive license, as alleged in the petition. And plaintiff shows the Court that under said petition and said answer thereto and under the contract described in said petition, plaintiff
7 was not and could not be made liable for said royalties unless it had elected to operate under an exclusive

license, and that no judgment against plaintiff for said royalties could be entered without the court's first determining that plaintiff had elected to operate under such exclusive license.

8. Plaintiff shows the Court that in due course, after said pleadings had been filed, said cause came on for trial before said Court and a jury in Division Number 7 thereof, presided over at the time of said trial by Honorable Karl Kimmel, Circuit Judge; that at said trial both plaintiff and defendant Lamar Lyndon produced witnesses and other evidence, but that there was no evidence of any kind or description, which, either directly or by inference, tended to show that the plaintiff had elected to operate under a license, but, on the contrary, there was direct and positive evidence that plaintiff had not exercised its right of election at all. At the conclusion of the evidence, pursuant to the [practices] of said Court, as described by the laws and Statutes of the State of Missouri, this plaintiff requested the Court to direct and instruct the jury as follows:

"The Court instructs the jury that under the contract the defendant was given the right to choose between purchasing the patent outright, or to operate under an exclusive license thereunder. If you believe and find from the evidence that the defendant did not elect either to purchase outright or to operate under an exclusive license, then your finding must be for the defendant."

Which instruction the Court refused to give, but, on the contrary, directed the jury as follows:

"The Court instructs the jury that under the contract sued on, defendant became bound to pay plaintiff for the third year, mentioned therein, namely, from March 2, 1914, to March 2, 1915, and each year thereafter, the sum of Three Thousand Dollars (\$3000.00) per year as royalty for the enjoyment of the rights under the patent mentioned in the contract, said royalty to be paid in advance, one-half in January and the balance in July of each year; that under the contract defendant's obligation to pay the royalty was absolute, unless at the expiration of two years from the date of the contract, namely, two years from March 2, 1912, defendant terminated the agreement in compliance with its terms.

8 You are further instructed that the defendant did not terminate the contract in the manner and within the

time specified therein. You will return your verdict, therefore, for plaintiff, in the sum of Ten Thousand Five Hundred Dollars (\$10,500.00), with interest from the dates each installment became due, as set out in the plaintiff's petition, to-wit:

Interest at the rate of six per cent per annum on the following amounts:

On \$1500 from January 1st, 1914 to date
On \$1500 from July 1st, 1914, to date
On \$1500 from January 1st, 1915, to date
On \$1500 from July 1st, 1915 to date
On \$1500 from January 1st, 1916, to date
On \$1500 from July 1st, 1916, to date
On \$1500 from January 1st, 1917, to date

Pursuant to said last mentioned instruction, the jury returned a verdict in favor of the defendant herein and against the plaintiff herein in the sum of \$12,029.50. Thereupon, on said day, upon the coming in of said verdict, the Court entered judgment for said sum against this plaintiff and in favor of the defendant herein, which said judgment is in words and figures as follows:

"Now at this day come the parties hereto by their respective attorneys, and the plaintiff, by leave of Court, files a reply to the defendant's amended answer; and this cause coming on for hearing, comes also a jury, to-wit: "Chas. T. Bastian, Claude M. Beal, Homer L. Browning, Barnabus M. Cornwall, Hudson R. Darst, Richard W. Garrett, Chas. L. Godlove, Harry J. Harms, Augustine P. Healy, Harry A. Hoyt, Edw. F. W. Mueller, Ira Neil, twelve good and lawful men, duly elected, tried and sworn well and truly to try the issues herein joined, and a true verdict render according to the law and the evidence; thereupon the trial of this cause progressed, and being finished the jurors aforesaid, upon their oaths aforesaid, and under the instruction of the Court, returned the following verdict:

"We the jury in the above cause find in favor of the plaintiff, on the issues herein joined, and assess plaintiff's damages at the sum of Ten Thousand Five Hundred Dollars (\$10,500.00) with interest from the dates each installment became due, to-wit:

Interest at the rate of six per cent per annum.

| | |
|--|------------------|
| On \$1,500 from January 1st, 1914, to date | \$353.00 |
| On \$1,500 from July 1st, 1914, to date | 308.50 |
| On \$1,500 from January 1st, 1915, to date | 263.50 |
| On \$1,500 from July 1st, 1915, to date | 218.50 |
| 9 On \$1,500 from January 1st, 1916, to date | 173.50 |
| On \$1,500 from July 1st, 1916, to date | 128.50 |
| On \$1,500 from January 1st, 1917, to date | 83.50 |
| Total Interest | <hr/> \$1,529.50 |

C. L. GODLOVE,
Foreman.'

Wherefore, it is considered and adjudged by the Court that the plaintiff have and recover of the defendant, the aggregate damages aforesaid assessed, to-wit, the sum of Twelve Thousand and Twenty-nine and 50/100 dollars (\$12,029.50) together with costs of suit, and have therefor execution. Verdict and instructions filed."

Said judgment is entered in Book 318 at page 143 of the Judgment Records of the Circuit Court of the City of St. Louis, Missouri.

9. Plaintiff says that afterwards, in due time, and in accordance with the laws and practices obtaining in the State of Missouri, and the rules of said Court governing such matters, plaintiff filed its motion for a new trial, which was denied, and thereupon it duly perfected an appeal to the Supreme Court of the State of Missouri, by which Court said judgment was, on the 19th day of July, 1920, affirmed. A copy of the opinion affirming such judgment is attached hereto, marked "Exhibit A", and made a part hereof. That plaintiff thereafter filed its motion for a re-hearing in said last mentioned Court, and a motion to transfer said cause to court en banc, both of which said motions were denied; that plaintiff thereupon filed in the Supreme Court of the United States its petition for a writ of certiorari to review said judgment of affirmance, which said petition for certiorari was denied on the day of 1921; and that plaintiff has exhausted its remedies at law.

10. Plaintiff shows the Court that neither the Circuit Court of the City of St. Louis, Missouri, which originally en-

tered said judgment, nor the Supreme Court of the State of Missouri which affirmed said judgment, considered or determined the question, whether or not this plaintiff had elected to operate under the patent referred to under a license; that said courts were without jurisdiction or power to enter
10 said judgment, or any judgment against plaintiff in said cause without considering said question and determining that plaintiff had elected to operate under an exclusive license; and that the action of said Circuit Court of the City of St. Louis, Missouri, in directing the jury to return the verdict aforesaid, and in entering the judgment aforesaid, without determining said question, and the action of the Supreme Court in affirming said judgment without determining said question, were arbitrary, and plaintiff has thereby been denied the equal protection of the laws, and plaintiff, by being compelled, as herein described, to pay to the defendant Mohrstadt the said sum of \$15,015.29 has thereby been deprived of its property without due process of law, and has been denied the equal protection of the laws, contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States.

11. Plaintiff further shows to the Court that when its appeal from the judgment of the Circuit Court of the City of St. Louis, Missouri, to the Supreme Court of the State of Missouri was lodged in said last mentioned Court, said cause was, in accordance with the laws of Missouri and the rules governing said Court, assigned to Division No. 1 thereof, consisting at said time of Judges Woodson, Graves, Blair and Goode; that under the laws of Missouri, and the uniform practice of said Court, this plaintiff, as appellant in said Supreme Court of Missouri, was entitled to have said cause set down for a hearing and entitled to an oral argument upon the proposition of law and the facts pertinent to said cause, before all the judges of said Division No. 1 who should participate in the decision thereof; that under the Constitution and Laws of Missouri then, and now in force, a dissent by any judge sitting in a division of the Supreme Court entitles the losing party to have said cause transferred to the court en banc, consisting of all the judges of said Court, and to have a hearing
11 before all of the judges of said Court, and a decision of the cause by said Court en banc. Plaintiff states that when this said cause came on for hearing in Division No. 1 of the Supreme Court, Judge Woodson was absent and at no

time present at the hearing, and that said cause was argued orally before the other three judges of said division, but that notwithstanding the fact that Judge Woodson was absent, and as to him plaintiff had had no hearing, yet, nevertheless, Judge Woodson participated in deciding said cause, and wrote the opinion of the Court. Plaintiff states that within due time after the filing of the said opinion, written as aforesaid by Judge Woodson, plaintiff filed its motion for a re-hearing, and its motion to transfer said cause to Court en banc, asserting therein that through the participation of Judge Woodson in the decision of said cause, without plaintiff's having had a hearing before him upon the law and the facts involved in such decision, plaintiff had been deprived of its right to due process of law, and had been deprived of the equal protection of the laws guaranteed to plaintiff by the Fourteenth Amendment to the Constitution of the United States; and plaintiff says that by Judge Woodson's participation in the decision of said cause under the circumstances and conditions aforesaid, plaintiff was deprived of due process of law, and deprived of the equal protection of the law, contrary to Section Fourteen of the Amendments to the Constitution of the United States.

12. Plaintiff says that on the 2nd day of May, 1921 the defendant Lamar Lyndon, through his attorneys Messrs. John C. Rippey and L. C. Kingsland, co-partners under the firms name of Rippey & Kingsland, caused to be issued under the said judgment of the Circuit Court of the City of St. Louis, Missouri, an execution conforming to the laws and practices obtaining to such matters in the State of Missouri, which said execution was directed to the Sheriff of the City of St. Louis,

and commanded him of the goods and chattels of the plaintiff to make the amount of said judgment, namely, the sum of \$12,029.50, interest and costs; that acting under said execution said Sheriff levied upon certain real estate in the City of St. Louis, Missouri, belonging to said plaintiff, of a value far in excess of the amount of said judgment, interest and costs, which at the time of said levy, amounted to the sum of \$15,000.00, and that having so levied upon said real estate, said Sheriff proceeded to advertise said real estate for sale at public auction in the City of St. Louis, Missouri, the time of said sale being fixed by him on the 7th day of June, 1921; that in and for avoiding the sale of said property under said execution, plaintiff appealed to the District Court of the United States for the Eastern Division of the Eastern District of Missouri, which said court and juris-

diction of the subject matter and of the parties, for a temporary injunction, restraining the sale of said property until the plaintiff could have a hearing upon its claim as herein described; that said judgment was void for the reasons hereinabove set out, which said application for a temporary injunction was denied on the 6th day of June, 1921; whereupon, plaintiff to avoid the sale of its said property, and under protest, paid to the Sheriff of the City of St. Louis, Missouri, the amount of said judgment, interest and costs, as described in said execution, to-wit, the sum of \$15,015.29, which said sum is now held by, and is in the possession of the defendant, Charles E. Mohrstadt, Sheriff as aforesaid, in the City of St. Louis, Missouri, within the Eastern Division of the Eastern District of Missouri.

13. Plaintiff shows the court that said fund, amounting as aforesaid to \$15,015.29, was wrongfully taken from the plaintiff as herein described, and in equity and good conscience belongs to the plaintiff, and should be returned to it; that said fund is now in the possession of the defendant Mohr-

13 stadt, and is in the City of St. Louis, Missouri, and in the Eastern Division of the Eastern District of Missouri; that the defendant Lyndon claims said fund as his property under and by virtue of the judgment aforesaid; and that defendant Mohrstadt will, unless restrained by this court, pay said fund over to said defendant Lyndon, and said defendant Lyndon will remove the same from the jurisdiction of this court, and said sum will be wholly lost to the plaintiff.

14. Plaintiff states that it is informed and believes, and so alleges the fact to be, that the defendant Lyndon has not sufficient property from which plaintiff could recover any judgment which it might obtain against defendant Lyndon, by reason of anything defendant Lyndon has done or threatens to do, as hereinabove described; that plaintiff has made diligent search for defendant Lyndon, and while defendant Lyndon is a citizen of the State of New York, and that is the place of his residence, his present whereabouts are to plaintiff unknown, and plaintiff, is, therefore, unable to have personal service upon defendant Lyndon of any notice of the filing of this suit, and of plaintiff's application in this suit for injunctive relief against defendant Lyndon; that plaintiff has exhausted all of its remedies at law against defendant Lyndon, and that plaintiff is remediless except in a court of equity.

15. Plaintiff says that the matter in controversy herein, exclusive of interest and costs, exceeds the sum and value of \$3,000.00.

16. Wherefore, the premises considered, plaintiff prays that a temporary injunction be issued herein, directed to the defendant Mohrstadt, restraining and enjoining him from paying said sum of money, or any part thereof, to defendant Lyndon, or to any one through him or on his order, and commanding him to retain said fund until the further order of

14 this court; and that a temporary injunction also be issued herein, directed to the defendant Lyndon, enjoining him from receiving, assigning or in any way disposing of said fund, or any part thereof, until the further order of this court; and that upon a final hearing, plaintiff be adjudged the owner of [an] entitled to receive said fund, and that defendants be directed to release all claims thereto; and for such other and further orders and decrees as to the court may seem proper.

ALBERT BLAIR
CHARLES A. HOUTS
THOMAS J. COLE
Attorneys for Plaintiff.

State of Missouri,
City of St. Louis,—ss.

Thomas J. Cole, being first duly sworn on his oath, says that he is one of the attorneys for the above named plaintiff, Wagner Electric Manufacturing Company; that he has personal knowledge of the matters and things in said petition referred to; that the facts therein stated are true; and that those matters and things stated upon information and belief, he believes to be true.

THOMAS J. COLE.

Subscribed and sworn to before me this 8th day of June, 1921.

My commission expires Oct. 5, 1924.

BOAZ B. WATKINS
Notary Public.

Statement.

In the Supreme Court of Missouri.

Division No. 1

October Term 1919.

Lamar Lyndon, Respondent,

No. 21135 v.

Wagner Electric Manufacturing Co., Appellant,

This suit was instituted by the plaintiff in the Circuit Court of the City of St. Louis against the defendant, to recover seven installments of \$1500.00 each alleged to be due him as royalties under a lease or license dated March 2nd, 1912, executed by the plaintiff to defendant.

The trial resulted in a judgment for the plaintiff for the amounts sued for, plus interest, which amounted to \$1529.50 each. After moving unsuccessfully for a new trial the defendant appealed the cause to this Court.

The facts of the case are substantially as follows:

The plaintiff was an electrical engineer of high standing in his profession, and as such was connected with the Edison Electric Co. of New York, and the defendant was a Missouri corporation organized and existing under the laws of this State, and was engaged in the manufacture and sale of electric motor appliances in the City of St. Louis. The plaintiff was the sole inventor and patentee of a certain system of propulsion and battery charging of electric vehicles, covered by United States patent issued to him, dated March 20, 1912, and numbered 815,360.

On March the 2nd, 1912, the patentee, the plaintiff, and defendant entered into the following contract or license, whereby the former authorized the latter to manufacture and sell the said device.

(Formal facts omitted).

"This agreement made this 2d day of March 1912, by and between Mr. Lamar Lyndon, a resident of New York City, party of the first part, hereinafter called "Lyndon", and the Wagner Electric Manufacturing Company, a corporation of Missouri, with principal offices in the City of St. Louis, Missouri, party of the second part, hereinafter called the "Company".

“Witnesseth: Whereas, said Lyndon is the inventor and owner of United States Letters Patent No. 815,360 of March 20, 1906, referring to system of propulsion and battery charging of electric vehicles; and whereas the Company desires to undertake the manufacture of the system involved in said patent. Now, therefore, in consideration of the agreements hereinafter set forth, and the sum of \$1.00 paid by the Company to said Lyndon, receipt of which is hereby acknowledged, the parties agree as follows:

“1. The said Lyndon agreed that the Company may elect between the privilege of purchase outright of the said patent or operating thereunder an exclusive license on the following terms:

“(a) Purchase outright. Within one year from the date that the Company offers for commercial sale an electric machine combining the functions of a driving motor for a vehicle and a converter for charging the battery of said vehicle from the alternating current source of supply, the Company may acquire full ownership and title to said patent upon the payment of Twelve thousand dollars (\$12,000). If the Company does not exercise this privilege within said period of one year, the privilege of purchase shall continue indefinitely during the life of the said patent subject to the stipulation that \$2000.00 shall be added to the purchase price for each period of six months thereafter or fraction thereof until the total price of purchase shall have attained the total sum of \$24,000.00, at which sum of \$24,000.00 the price shall continue during the life of the patent. It is especially agreed that the purchase price shall be reduced by the amount of any sums paid to said Lyndon in [royalties] or otherwise.

“(b) Royalties. It is agreed that the Company is manufacturing at this time three standard sizes of direct current motors for driving electric vehicles, rated at 12, 14 and 16, respectively. Should the Company not elect to purchase outright, as provided in clause ‘A’ above, it may operate as an exclusive licensee under said patent hereinbefore referred to on the basis of a royalty of \$4, \$5, and \$6 per machine, respectively, for machines built under said patent and delivering as motors as output equivalent to the said 12, 14 and 16 frames. If the Company shall developed additional sizes of equipment, it is agreed that a royalty per machine shall be arrived at for each machine fairly in proportion to the royalties stipulated for the frames mentioned in this paragraph.

'2. It is agreed that the company shall have a interval of approximately 30 days to investigate the validity of said Patent 815,360. At the end of that time the Company shall pay Lyndon the cash sum of \$750.00. It is the spirit of this paragraph that the Company will immediately and diligently make the investigation herein described, and if it does not receive it within the period of time described an extension of 10 days is hereby agreed to. At the end of seven months from the date of this agreement, the Company shall pay an additional cash sum of \$1000.00; both of said sums of \$750.00 and \$1000.00, respectively, are paid irrespective of commercial development and in the nature of a cash sum in consideration of this contract.

'3 It is mutually agreed that the Company shall not pay a minimum royalty during the first two years of this contract, but that for the third year under this agreement, assuming that the Company elects to operate under the exclusive license provisions in this contract, and for each year thereafter, the Company shall pay a minimum royalty of \$3,000 per year. Said royalty to be paid in advance, half in January and the balance in July of each year, respectively.

17 '4. Should the Company elect to operate on the royalty plan, it is agreed that any royalties over and above the minimum provided for in paragraph 4 shall be paid to the said Lyndon semi-annually, as soon as the Company can reasonably make up accounts therefor. It is understood and agreed that accountings, either for minimums or for royalties in excess of minimums, shall be made and the sums due the said Lyndon paid within 30 days from the time stipulated in this agreement.

'5. It is the spirit and intent of this contract that the said Patent 815,360, is controlling in the art for the purpose covered by the claims thereof. If it should prove, in the course of time and the operations under this agreement that said patent is not controlling, then the Wagner Company may apply for a readjustment of the purpose price figures and royalties herein before stipulated. And it is agreed that such purchase price and royalties shall be pro-rated to a proper measure of the protection secured by the patents. If there should be any difference between the parties hereto in respect to proper rerating, the question shall be arbitrated in the usual manner.

'6. The Wagner Company undertakes to assume the cost of any patent litigation arising in connection with said patent. The said Lyndon agrees to co-operate with the Company in any litigation offensive, or defensive, in which the Company may become involved. There is nothing, however, in this contract which obligates the Company to engage in patent litigation unless it so elects.

'7. Improvements on this Patent. If the said Lyndon agrees to deliver to the Company by assignment in improvements he may make upon said patent 815,360 during the life of said principal patent. The Company, however, agrees to pay all costs of taking out United States Letters Patent of said improvements. The said Lyndon agrees that with respect to improvement patents provided for under this agreement, that the Company may also have the right to said improvements in territory under control of the United States, as the Philippine Islands, etc., the Company assuming to pay the costs of securing protection in such territory.

'8. If, at the expiration of two years from the date of this agreement, the Company desires to terminate the agreement, all rights conveyed hereunder to the Company by Lyndon are to revert to Lyndon and the Company hereby agrees to make such reassignment of said rights and patents; and further to furnish to said Lyndon a complete set of such drawings and designs as have been made by the Company for the construction of machine under said Patent No. 815,360.

In witness whereof, the parties hereto have fixed their names this 2nd day of March, 1912.'

"By paragraph three of the foregoing contract it was provided that after two years from its date, if the Wagner Electric Manufacturing Company elected to operate under the exclusive license provisions of the contract, it should pay to Lyndon a minimum royalty of \$3,000.00 per year; payable in semi-annual installments in January and July of each year. By this suit plaintiff seeks to recover seven such semi-annual installments alleged to have fallen due, commencing January 1, 1914, up to and including January 1, 1917, aggregating \$10,500.00.

18 Plaintiff, to sustain the issues on his part, introduced in evidence, the contract above set out. He next intro-

duced in evidence an assignment to the defendant of the patent referred to in the contract, which assignment concluded with the following paragraph:

‘This assignment is, however, made subject to the terms and conditions of the agreements made and entered into between me, my heirs and assigns, and the said Wagner Electric Manufacturing Company, its successors and assigns. Dated March 2, 1912, and April 12, 1912.’

Plaintiff himself was the sole witness in his behalf. Upon the subject of whether or not the Wagner Electric Manufacturing Company had availed itself of the right given it by the contract to elect to purchase or to elect to operate as a licensee, plaintiff himself testified:

‘Mr. Kingsland (continuing): Q. Did the company avail itself of the privilege of purchasing the patent outright, or did they elect to proceed under the patent as a licensee?’

Mr. Houts: I object to that as immaterial.

The Court: That is one of the things, whether they availed themselves of the privilege—

Mr. Kingsland: I will confine the question, therefore, as to whether the defendant Company availed themselves of the right to purchase outright.

The Court (addressing witness): You may answer that question.

To which ruling of the Court, the defendant, by its counsel, then and there duly excepted, and still continues to except.

The Witness: A. I never understood that it was the intention of the company to purchase outright.

Mr. Houts: I object to that and move that it be stricken out.

The Court: The objection is sustained, and the motion to strike out is sustained. (Addressing witness) You are asked whether or not they purchased this patent outright; you can answer by saying ‘yes’ or ‘no’. Did they ever purchase this patent outright from you? A. I have never been sure, your Honor; they had the option of doing two things.

The Court: Q. Did you ever get \$24,000 for this patent? A. Never; they never purchased it.

The Court: They never purchased it? A. No.

The Court: Q. What is the date of that assignment? A. April 12, 1912.'

On cross-examination the plaintiff testified that his patent had been issued to him in 1906; that no complete machine had ever been manufactured under the patent; that after the contract with the Wagner Company no machine had ever been built to his knowledge.

For the defendant, Mr. W. A. Layman, President of the Wagner Electric Manufacturing Company, was the only witness. He testified that he himself dictated the contract of March 2, 1912, in Mr. Lyndon's office. After the execution of this contract, Mr. Layman returned to St. Louis and started the construction of an experimental machine.

Prior to that date, so far as Mr. Layman was aware, no machine had been built. Mr. Layman also started his patent attorney, E. E. Huffman, upon an investigation of the patent. Under paragraph two, of the contract of March 2, 1912 the Wagner Company was granted a total of forty days within which to investigate the validity of the patent. At the end of that time Mr. Layman went to New York, and told Mr. Lyndon that the investigation was incomplete and unsatisfactory. Up to that time no payment had been made to Mr. Lyndon.

The defendant offered to show by the witness Layman what took place at the meeting between him and the plaintiff on April 12, 1912, but this the Court excluded upon objection by the plaintiff. Defendant's offer was as follows: 'I wish to offer to prove that on the occasion referred to by the witness, the witness told the plaintiff that the validity of the patent was not sustained by the investigation which he had caused to be made by his patent attorneys, and that further time was desired for the purpose of making an investigation, and that he would not pay the \$750 unless the contract was modified so as to permit the Wagner Electric Manufacturing Company to withdraw from the contract and terminate the contract by the time the next payment of a thousand dollars was to be paid under the terms of the original contract, and that thereupon the plaintiff agreed that it should be modified in the parts covered by a letter dated on that date, drawn up at that time'; and the letter was as follows: (signatures omitted)

Mr. Lamar Lyndon,
60 Broadway
New York City,

Dear Sir:—

In accordance with the terms of our contract of March 2nd and your supplementary letter of the same date, pertaining to U. S. Patent No. 815,360, I hand you herewith accepted sight draft on our company in the sum of Seven hundred and fifty dollars (\$750.00). This covers the first payment provided for in paragraph 2 of our agreement.

You will understand by this letter and this payment that the Wagner Company avails itself of the licenses, privileges, etc. under U. S. Patent No. 815,360 contemplated and covered by our agreement of March 2. We are proceeding actively with the design and manufacture of an experimental equipment and expect to have the same on test in approximately sixty (60) days. It was a part of our understanding in connection with the agreement of March 2nd, that it might be re-drafted as to language form etc. by our attorneys, if they deem it desirable to do so.

I am leaving for Washington to-day and if in the opinion of our counsel, Mr. Melville Church, such re-drafting is desirable, I will present to you a redrawn form of agreement for your signature early during the coming week. Under the terms of the agreement of March 2nd, next payment to you on account of this contract in the sum of One Thousand Dollars (\$1000.00) will be due and payable October 2nd, 1912, providing the Wagner Company at that time desires to go forward with the agreement. If at that time, the Wagner Company should desire to elect to withdraw from further obligations under the contract, it is understood and agreed that they may do so, forfeiting, however, the sum of the payment of Seven Hundred and Fifty Dollars (\$750.00) tendered you with this letter.

While in Washington, I will have Mr. Church draft a brief license agreement for recording at Washington, as required under the terms of the United States Patent Law."

The testimony offered to be introduced was excluded by the Court over defendant's objection. The Court also excluded the letter of April 12, 1912. The defendant also offered to show by the witness Layman that the defendant had at no time built or sold any machines under the patent in question, and had at no time exercised any rights over the patent; and that the defendant had done nothing more than build an ex-

perimental machine, which experimental machine was not a success. Objections to this offer of proof having been made, the Court announced its ruling in the following language:

‘The Court: That objection will be sustained, because the transaction to this day shows that the right of election is still open.’

The defendant also offered to show that in October 1912, witness had a conversation with the plaintiff in which he told plaintiff that a machine constructed under the patent was not a commercial success, and that following this conversation defendant wrote a letter to this plaintiff dated, November 9, 1912, as follows:

‘We have decided to avail ourselves of the privileges accorded under our letter of April 12th, 1912, and also in accordance with the conversation of Mr. Fynn and myself with you in New York City, October 18th, and terminate the agreement with you with respect to Patent No. 815,360. For this reason, your draft of \$1,004.16 which would otherwise have constituted a second payment under the agreement, was ordered returned to you yesterday.’

I will ask your attorney to prepare a proper form of re-assignment to you of Patent No. 815,360 and will forward this to you in the very near future.’

Plaintiff objected to the introduction of this letter and to the offer of proof, and the objection was sustained. Defendant also offered to show by the same witness why a re-assignment of the patent at that time had not been made to the plaintiff. The plaintiff objected, and the objection was sustained by the Court. Mr. Layman testified that the Wagner Company had at no time elected either to operate under the license provisions of the contract or to purchase the patent. The defendant also offered in evidence its answer in a suit filed on the 13th day of March, 1913, by the plaintiff against the defendant, being Cause No. 83059, in the Circuit Court of the City of St. Louis, in which answer the defendant notified the plaintiff that it had terminated and abandoned the contract, and was claiming no rights under it. To this offer of proof the plaintiff objected, and the Court sustained the objection.

The defendant also offered to introduce in evidence a letter from the plaintiff to the defendant, dated March 6, 1912, as follows: (Formal parts omitted).

‘This is a request that you will kindly have your attorneys expedite the search you propose to have made in connection

with my patent on automobile motors, and to bring the matter to as speedy a conclusion as possible.

My reason for asking this is that I have to-day received a favorable letter from the other parties who were considering the purchase of this patent. If you should decide not to consummate the agreement, I would like to sell it to them; on the other hand, I do not desire that they shall expend any time or money in an investigation if it would prove fruitless for them to do so. The terms of our agreement give us 40 days to conclude the matter, but in view of this communication to-day, I trust you will do everything in your power to reach your decision as early as possible.

This letter was also excluded upon plaintiff's objection.

At the conclusion of the testimony the Court gave a peremptory instruction directing the verdict for the plaintiff for the full amount sued for with interest.

Opinion.

Counsel for appellant first insists that the trial court erred in its ruling excluding the letter from Mr. Layman, the president of the Company, to Mr. Lyndon, the patentee of the electric device mentioned, dated April 12, 1912, set out in the statement of the case. In our opinion that insistence is well grounded, and consequently the ruling of the Circuit Court in that regard was erroneous. That letter was written within the forty days within which the Company had to accept or reject the contract dated March 2, 1912. In said letter of April 12, 1912, the Company practically rejected the contract, and so stated, unless the plaintiff would extend the time to the defendant to accept or reject the contract until October 2, 1912, the date when the \$1000.00 mentioned in the contract, paragraph 2, was to become payable; and in which letter the Company enclosed to plaintiff a draft for \$750., the amount of the first payment due under the contract.

The plaintiff, in accepting the letter of April 12, 1912 and the draft for \$750 therein enclosed, thereby, by implication, assented to the extension of the time in which the defendant might exercise its option to accept or decline to accept the contract of March 2, 1912. In our opinion there can be no reasonable doubt but that by agreement of the parties, the time to accept or reject the contract of March 2, 1912, was extended to October 2, 1912, which fact the defendant had the

right to show by the offered evidence, which, by the Court was excluded upon the objection of the plaintiff; that was error.

22 But in the light of the remainder of the record bearing upon that question, we are unable to see in what possible way that error injured the defendant. The record further shows that the defendant did not accept or reject the contract within the time of extension before mentioned, to-wit, October 2, 1912, and did not until November 9, 1912, more than a month after the expiration of the time in which the defendant had to accept or reject it. So we are of the opinion that the error before mentioned was harmless, and did the defendant no harm.

II.

Counsel for defendant also contend that the trial court erred in excluding the letter of Mr. Laymen, the president of the Company to Mr. Lyndon, the plaintiff, dated November 9, 1912, terminating the contract of March 2, 1912.

In our opinion this contention is not well grounded, for the reason that, by paragraph 8 of the contract, it is provided, that: "If, at the expiration of two years from the date of this agreement" it may so do etc. While the said letter of November 9, 1912, undertakes and attempts to terminate the contract of March 2, 1912, yet that attempt was ineffectual for the reason that said attempt was made before the two years had expired, mentioned in said paragraph 8 of the contract, and therefore, the attempt was premature and not binding upon the plaintiff.

There was no error in excluding said letter.

For the same reason the Court excluded the letter of defendant to the plaintiff dated November 9, 1912, as before stated. The Court also properly excluded the answer of the defendant filed March 13, 1912, in a suit instituted by plaintiff against the defendant to recover the \$1000.00 mentioned in paragraph 2, of the contract. That answer was filed practically one year before the two years before mentioned, had expired, and therefore long prior to the time the defendant had the right to terminate the contract.

Finding no error in the record, the judgment of the Circuit Court is affirmed. All concur.

A. M. WOODSON, Judge.

23 (Motion of Defendant, Charles E. Mohrstadt, Sheriff,
 etc., to dismiss.)

(Filed in the U. S. District Court on June 20, 1920.)

State of Missouri,
County of St. Louis—ss.

In the District Court of the United States for the Eastern
Judicial District of Missouri.

Wagner Electric Manufacturing Company, a corporation,
Plaintiff,
vs.

Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City
of St. Louis, Missouri, Defendants.

Comes now Charles E. Mohrstadt, the Sheriff of the City
of St. Louis, State of Missouri, one of the defendants in the
above entitled cause, and prays the Court to dismiss the
plaintiff's bill filed herein for the following reasons, to-wit:

First: The Court has no jurisdiction of this party de-
fendant, the Sheriff of the City of St. Louis.

Second: The Court has no jurisdiction of the subject mat-
ter of this suit as against the Sheriff of the City of St. Louis
for there is no diversity of citizenship as between the Sheriff
of the City of St. Louis and the plaintiff herein—The Wag-
ner Electric Manufacturing Company and said Sheriff be-
ing both citizens of the State of Missouri—and there is no
substantial federal question involved between the plaintiff
and this defendant.

Third: For the reason that the plaintiff's petition filed
herein does not contain facts sufficient to constitute a
24 cause of action against this defendant.

Fourth: There is no equity in the plaintiff's bill as
against this defendant.

Fifth: From all the facts as stated in the bill, the plain-
tiff has a full, complete and adequate remedy at law.

Sixth: From the facts stated in the bill, the question in-
volved in the plaintiff's bill is res adjudicata, having been
finally determined in the original suit between the plaintiff
and the defendant, Lamar Lyndon.

Seventh: The plaintiff in said bill has not offered to do
equity so far as the defendant Sheriff is concerned, when the

plaintiff is charged with the knowledge that the Sheriff of the City of St. Louis has made a levy under a perfectly good and valid execution so far as said Sheriff is concerned and collected the proceeds of the judgment, that under the law, it is said Sheriff's duty to pay said proceeds over to the judgment creditor, Lamar Lyndon, or subject himself to the danger of being required to pay not only six (6) per cent interest on said proceeds while the same are being held by him, but also to pay a penalty of five (5) per cent per month for withholding such payment, and in seeking equity in this Court, the plaintiff has not proffered any indemnity or security whatever to save this defendant harmless from any such liability or penalty that may be imposed by law.

Wherefore, the premises considered, this defendant prays that the plaintiff's bill be dismissed, and that this defendant be discharged with its costs.

CLARENCE T. CASE

Attorney for Charles E. Mohrstadt,
Sheriff of the City of St. Louis.

25 Application for Special Setting of Motions to Dismiss.
(Filed in the U. S. District Court on June 20, 1920.)

Comes now Charles E. Mohrstadt, Sheriff of the City of St. Louis, State of Missouri, one of the defendants in the above entitled cause, and respectfully represents to the Court that on or about the eleventh day of June, 1921, and since the above entitled suit, this defendant has been served with the following notice, to-wit:

Lamar Lyndon, Plaintiff,
vs.

Wagner Electric Manufacturing Company, Defendant.

June Term, 1917, Cause No. 9984

Execution No. 93. June Term, 1921.

Hon. Charles E. Mohrstadt, Sheriff of the City of St.
Louis, Mo.

Sheriff's Office,

St. Louis, Missouri.

Sir:—

26 Formal demand is hereby made on behalf of Lamar Lyndon, and ourselves as attorneys of record in the above entitled cause, for the money made on the ex-

execution in said cause, said execution being No. 93, June Term, 1921, to-wit: \$14,561.70, the debt and interest due on the judgment in said cause, and now held and retained by you from the said plaintiff without legal justification or excuse.

You are hereby further notified of the intention and purpose of the plaintiff to proceed under Section 1673 of the Revised Statutes of Missouri, 1919, for the recovery of the amount so withheld, together with lawful interest thereon, and damages at the rate of five (5) per cent per month, as provided by said statute.

Respectfully,

(Signed) RIPPY & KINGSLAND
Attorneys for Lamar Lyndon, plaintiff
in the above-entitled cause.

Your petitioner further states that he has filed a motion to dismiss the plaintiff's bill in this cause, which said motion is now pending in this Court, and that by reason of the heavy penalties named by the execution of Lamar Lyndon, it is necessary that this defendant's motion to dismiss be determined as speedily as possible.

Wherefore, The premises considered, this defendant prays that the Court grant defendant a special setting and an early hearing on said motion to dismiss.

CLARENCE T. CASE
Attorney for Defendant Charles E.
Mohrstadt, Sheriff, City of St. Louis,
Missouri.

27 (Motion of Defendant, Lamar Lyndon to dismiss.)

(Filed in the U. S. District Court on July 13, 1920.)

Comes now the defendant, Lamar Lyndon, by his solicitors, and appearing specially for this motion and none other, moves the Court to dismiss the bill of complaint herein, for the following reasons, to-wit:

1. That the Court is without jurisdiction of this suit for the reason that there is no diversity of citizenship and, as appears from the face of the bill, there is no substantial Federal question involved.

2. That the Court has no jurisdiction of this cause for the reason that it is a suit, as appears from the face of the

bill, seeking a writ of injunction to stay proceedings in a state court, contrary to Section 265 of the Judiciary Act.

Wherefore, defendant, Lamar Lyndon, prays that the bill of complaint be dismissed and that this defendant recover his costs.

RIPPEY & KINGSLAND
Solicitors for defendant
Lamar Lyndon.

28 (Opinion sustaining motion of Charles E. Morhstadt, Sheriff, to Dismiss.)

(Filed in the U. S. District Court on August 1, 1921.)

It is settled that an action may be maintained where the court has jurisdiction of the parties to set aside a judgment of a State Court—(1) where it was rendered without jurisdiction; (2) where it is unconscionable because of (3) fraud, (4) accident, or (5) other fact or condition which properly brings the cause of action within the powers of a court of equity.

In *Simon v. Railway*, 236 U. S. 115, service was held invalid; consequently the judgment was void for want of personal jurisdiction.

But it is useless to review authorities in detail. The distinction between those cases and the case at bar is clear.

"An attack upon a judgment of a state court cannot be entertained by a Federal court where the proceeding is merely tantamount to a motion to set a judgment aside for irregularity, or to a writ of error, or to a petition or bill of review. Proceedings of the latter character, as a matter of course, are only maintainable in the court where the record remains." *U. S. v. Norsch*, 42 Fed. 417.

The whole matter is fully reviewed and disposed of in *National Surety Co. v. State Bank*, 120 Fed. 593, in which Judge Sanborn says,—

29 "But it (the court) has no power to take such action on account of the errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the courts which render the judgment or decree".

Numerous cases are cited.

In this case there is no claim of lack of jurisdiction. No claim of fraud; no claim of accident. The claim that the judgment is unconscionable is based upon the assertion that the trial court and the Supreme Court of Missouri erred in failing and refusing to pass upon a specific question fully presented to the Court. This error was presented in the trial court by a motion for a new trial. In the Supreme Court by a petition for rehearing. Evidently the trial court and the Supreme Court did not deem it necessary to decide the question urged. Whatever may be the reason, the parties appeared in the court of general jurisdiction—the tribunal fixed by the people of the State of Missouri, with full power to hear and determine the matters in issue.

Even if there was error, as alleged by the plaintiff, there is no mode by which such error may be reviewed, except the mode provided by the statutes of Missouri and the practice of the courts of Missouri. It is safe to say that in nine cases out of ten, the defeated party, after he reads the opinion of the Supreme Court, still honestly believes that he is right, and that the court is wrong. It is a common complaint of counsel that the Supreme Court of the State, or of the United States, failed to consider and pass upon some particular point which they consider as conclusive. Any rule by which this Court would assume jurisdiction of an action to set aside a judgment because the Judge failed or refused to consider and determine some specific point urged by counsel, would soon double the present heavy trial dockets.

30 There are no facts alleged entitling the plaintiff to maintain this suit.

(Decree, July 31, 1921.)

And now on this 31st day of July, 1921, the motion of Charles E. Mohrstadt, Sheriff, to dismiss the plaintiff's petition, having been heretofore submitted, and the court being now fully advised, finds that said motion should be, and the same is hereby sustained. The plaintiff's petition is dismissed and judgment is rendered against the plaintiff for costs, taxes at \$.

Plaintiff excepts.

MARTIN J. WADE,
Judge.

31 (Petition for Appeal.)

(Filed in the U. S. District Court on October 17, 1921.)

The above named plaintiff, Wagner Electric Manufacturing Company, a corporation, conceiving itself aggrieved by the order entered on August 1, 1921 in the above entitled proceedings, doth hereby appeal from said order to the United States Circuit Court of Appeals, and it prays that this, its appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals.

CHARLES A. HOUTS,
ALBERT BLAIR,
THOS. J. COLE,
Attorneys for Plaintiff and
Appellant, Wagner Electric Manu-
facturing Company, a corporation.

32 Assignment of Errors.

(Filed in the U. S. District Court on October 17, 1921.)

Now comes the Wagner Electric Manufacturing Company, a corporation, the plaintiff in the above entitled cause, and files the following assignment of errors upon which it will rely in its prosecuting of the appeal herein, from the decree made and entered by this Honorable Court on the 1st day of July, 1921.

1. The District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri erred in sustaining defendant's motion to dismiss the plaintiff's petition herein.

2. Said court erred in dismissing plaintiff's petition and rendering judgment against plaintiff for costs.

3. Said court erred in holding that it was within the jurisdiction of the Circuit Court of the City of St. Louis, Missouri to enter the judgment, (under which plaintiff's property was taken) without having received or considered any evidence whatsoever upon the question which, under the pleadings, had to be determined before any judgment could be rendered against the plaintiff.

4. Said court erred in holding that it was within the power of the judge of the Circuit Court of the City of St. Louis, Missouri to direct and compel the entry of the judgment under which plaintiff's property was taken, without the Judge or the jury in said cause having considered and determined the controlling question in the cause, raised by the pleadings therein, without a determination of which no verdict or judgment could be rendered against the plaintiff.

33 5. Said court erred in holding that it was within the power of the Supreme Court of the State of Missouri to affirm the judgment of the Circuit Court of the City of St. Louis, Missouri under which plaintiff's property was taken, without plaintiff having an opportunity to be heard in the oral presentation of said cause before all of the judges participating in the determination of said cause in said Supreme Court.

6. Said court erred in holding that the judgment of the Circuit Court of the City of St. Louis, Missouri, under which plaintiff's property was taken, and the judgment of the Supreme Court of Missouri affirming said judgment, were not prohibited and made void by those provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which prohibit the taking of property without due process of law and guarantee to every person the equal protection of the law.

7. Said court erred in holding that the defects in said judgment and in the rendition thereof, as described in the plaintiff's petition, were mere errors, which could only be reviewed in the manner and mode prescribed by the Statutes of the State of Missouri.

Wherefore, the appellant prays that said decree be reversed, and that said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri be ordered to enter a decree reversing the decree complained of and re-instating plaintiff's case in said court.

THOS. J. COLE
CHARLES A. HOUTS
For Plaintiff (Appellant)

(Filed in the U. S. District Court on October 17, 1921.)

Know All Men By These Presents,

That we, Wagner Electric Manufacturing Company, Principal, and Massachusetts Bonding and Insurance Company of Boston, Mass., as Surety are held and firmly bound unto Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis in the full and just sum of Five Hundred (\$500.00) Dollars to be paid to the said Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, their heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 12th day of October in the year of our Lord one thousand nine hundred and Twenty-one.

Whereas, lately at the term A. D. 19, of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in a suit depending in said Court between Wagner Electric Manufacturing Company, a corporation, plaintiff and Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, defendants, final decree was rendered against the said Wagner Electric Manufacturing Company, a corporation, and said Wagner Electric Manufacturing Company has obtained an appeal of the said Court to reverse the said final decree in the aforesaid suit, and a citation directed to the said Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, citing and admonishing them to be and appear in the United States Circuit Court of Appeals, for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the Condition of the above Obligation is such, That if the said Wagner Electric Manufacturing Company shall prosecute said appeal to effect, and answer all damages and

costs if it fail to make good its appeal, then the above obligation to be void, else to remain in full force and virtue.

Scaled and Delivered in the Presence of

WAGNER ELECTRIC
MANUFACTURING COMPANY,
a corporation

By W. A. Layman (Seal)

MASSACHUSETTS BONDING &
INSURANCE COMPANY (Seal)

By Paul Robyn (Seal)
Resident Vice President

Attest: John J. Henschke,
Resident Assistant Secretary.

Approved by C. B. Faris, Judge.

35

(Order allowing appeal, etc.)

Now at this day comes the plaintiff, by its attorneys, and files and presents to the court its petition for appeal to the United States Circuit Court of Appeals, its assignment of errors, and an appeal bond in the sum of Five Hundred Dollars, with the Massachusetts Bonding & Insurance Company of Boston, Massachusetts, as surety, and prays an appeal in the above entitled cause. And the Court having seen and examined said petition and bond, doth order that said bond be approved and filed, which is done, and that an appeal be and is hereby allowed said plaintiff to the United States Circuit Court of Appeals, from the judgment or decision of the court heretofore rendered herein.

Dated: October 17th, 1921.

C. B. FARIS,
Judge.

33 **(CLERK'S CERTIFICATE TO TRANSCRIPT.)**

UNITED STATES OF AMERICA.

*Eastern Division of the Eastern**Judicial District of Missouri, ss:*

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

I, Jas. J. O'Connor, Clerk of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby Certify that the foregoing is a true and complete record of the proceedings in Cause No. 5714, wherein the Wagner Electric Manufacturing Company, a Corporation, is Plaintiff, and Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, are defendants.

In Witness whereof, I hereunto subscribe my Name and affix the seal of said Court at office in the City of St. Louis, in the Eastern Division of said District, this 14th day of December in the year of our Lord nineteen hundred and twenty-one. [Seal U. S. Dist. Court, East. Div., East. Jud. Dist. Mo.] Jas. J. O'Connor, Clerk of said Court.

Filed Dec. 15, 1921. E. E. Koch, Clerk.

34 **(APPLICATION OF APPELLANT FOR LEAVE TO AMEND ASSIGNMENT OF ERRORS AND ADDITIONAL ASSIGNMENT OF ERRORS.)**

[Title omitted.]

Now comes counsel for the appellant in said cause and states to the Court that on the 17th day of October, 1921, he filed in the United States District Court for the Eastern District of Missouri, an assignment of errors intended to be a part of the record in said cause; that the Clerk of this Court thereafter, to-wit: on the 6th day of February, 1922, furnished to counsel, a printed copy of the record in said cause as certified to this Court; that on examination of said printed copy counsel for appellant found that the assignment of errors in said record did not contain two specifications of error which counsel regards as too important to be omitted. Counsel thereupon sought to obtain from the attorney for appellee, Sheriff Charles E. Mohrstadt, and from Messrs. Rippey & Kingsland, attorneys for Lamar Lyndon, assent to an amendment as hereinafter proposed, which assent they declined to give.

Wherefore counsel for appellant asks the Court to make an order by which the record, assignment of errors and transcript thereof be corrected and amended in the following respects:

First. By striking out wherever it may occur in said record and transcript, the Roman numerals IV and IX and substituting in each such case the word "Fourteenth."

Second. To amend said record by inserting two other additional specifications of error to be numbered respectively, No. 8 and 9. Said No. 8 to be in the following words, to-wit:

No. 8. That said Court erred in dismissing plaintiff's bill as to the defendant Charles E. Mohrstadt, Sheriff of the city of St. Louis.

Said No. 9 is as follows:

35 No. 9. That said Court erred in holding that judgment was not invalid notwithstanding Division No. One of the Supreme Court of Missouri had refused to grant the motion of the appellant in this case, (then defendant in the suit of Lamar Lyndon vs. Wagner Electric Manufacturing Company, then pending in Division No. One of the Supreme Court of Missouri) to transfer said cause to the Supreme Court of Missouri sitting in banc, as required by the Fourth Section of the Amendment of 1890 to the Constitution of the State of Missouri; said Section Four of the said Constitution is stated in the following language:

"Sec. 4. Case transferred to Court in banc, when.—When the judges of a Division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause on the application of the losing party, shall be transferred to the court for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

Said motion states as follows, to-wit:

[Title omitted.]

APPELLANT'S MOTION TO TRANSFER TO COURT EN BANC.

[Filed Mar. 30, 1922.]

Now comes the appellant, Wagner Electric Manufacturing Company, and feeling itself aggrieved by the judgment of affirmance entered herein, moves the Court to transfer said cause to Court en banc for rehearing upon the questions involved; and for the grounds of its said motion states:

1. That his honor, Judge Woodson, who wrote the opinion in this cause and participated in the decision thereof, was not present at the oral argument.

36 2. The appellant in being denied the right of oral argument before the Judge of this division who wrote the opinion, and participated in the decision of this case, was denied the right of due process of law, as guaranteed to it by Section 30 of Article II of the Constitution of the State of Missouri.

3. The appellant by being denied the right of oral argument before the Judge of this division who wrote the opinion and participated in the decision of this case, was denied the right of due process of law guaranteed to it by Article XIV of the Amendments to the Constitution of the United States.

4. A Federal question is now involved, justifying the transfer of this cause to Court en banc, as provided in Section 4 of the Amendment of 1890 to the Constitution of the State of Missouri.

5. The Court inadvertently has misconstrued the contract herein sued upon, and inadvertently has failed to consider the lack of evidence and the lack of pleadings in this cause, to sustain the judgment which it has ordered affirmed, and the Court should, of its own motion, order this case transferred to Court en banc for reargument, because of the denial of justice which results from the decision herein rendered. Albert Blair, Charles A. Houts, Attorneys for Appellant.

Notice of the presentation of this application was given to Mr. Clarence T. Case, counsel for the appellee, Sheriff Charles E. Mohrstadt, and also on Messrs. Rippey & Kingsland, attorneys for Lamar Lyndon on the 22nd day of March, 1922. — — —, Attorneys for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on March 30, 1922.

37 **(ORDER GRANTING LEAVE TO APPELLANT TO FILE ADDITIONAL ASSIGNMENT OF ERRORS.)**

[Filed March 30, 1922.]

[Title omitted.]

Upon motion of counsel for appellant for leave to amend its assignment of errors herein, counsel for appellees being present and not objecting thereto, it is ordered by the Court, that leave be, and is hereby, granted the appellant herein to file its amendment to the assignment of errors and that said motion containing the amendment be printed and added to the record heretofore printed.

March 30, 1922.

38 **(APPEARANCE OF COUNSEL FOR APPELLANT.)**

[Filed Dec. 15, 1921.]

[Title omitted.]

The Clerk will enter my appearance as Counsel for the Appellant, Charles A. Houts, Albert Blair, Pierce Bldg., St. Louis. Thomas J. Cole, 1530 Boatmens Bank Bldg.

(APPEARANCE OF COUNSEL FOR APPELLEE.)

Filed in U. S. Circuit Court of Appeals Feb. 8, 1922.

The Clerk will enter my appearance as Counsel for the Appellee, Clarence T. Case. Victor J. Miller. David W. Voyles.

39 **(MOTION OF APPELLEE LYNDON TO DISMISS.)***Notice.*

[Filed March —, 1922.]

To Wagner Electric Manufacturing Company, or Its Attorney of Record:

You are hereby notified of the filing of the annexed Motion to Dismiss the above-entitled cause, and you are further hereby notified that on Wednesday, March 15, 1922, at 2 o'clock P. M., or as soon thereafter as counsel may be heard, the said Motion to Dismiss will be called for hearing in the United States Circuit Court of Appeals, Eighth Circuit, at the Custom House, St. Louis. Rippey & Kingsland, Attorneys and of Counsel for Lamar Lyndon.

St. Louis, Missouri, March 14, 1922.

Received a copy of the foregoing Notice, and annexed Motion to Dismiss, this 14th day of March, 1922. Charles A. Houts, Attorney for Wagner Electric Manufacturing Company.

* * * * *

MOTION TO DISMISS.

[Filed Mar. 15, 1922.]

Now comes Lamar Lyndon, nominal appellee in the above-entitled cause and appearing, through his attorneys, for the purpose of this motion and none other, moves the Court to dismiss the appeal filed herein as against said nominal appellee, and for grounds thereof shows:

40 1. That the said Lamar Lyndon is a citizen and resident of the City of New York and State of New York.

2. That the said Lamar Lyndon has never been served with any process in said cause and has never entered any appearance in said cause subjecting him to the jurisdiction of the District Court, or of this Court.

3. That no citation has ever been served upon the said Lamar Lyndon, nor has the service of the same been in any wise waived.

Wherefore, the said Lamar Lyndon prays that the appeal herein be dismissed as to him. Lamar Lyndon, By John D. Rippey & L. C. Kingsland, Attorneys and of Counsel for Lamar Lyndon.

STATE OF MISSOURI,
City of St. Louis, ss:

Lawrence C. Kingsland, being duly sworn, states that he is the attorney and of counsel for Lamar Lyndon, a nominal appellee in

the above-entitled cause; that he knows the facts stated in the above motion, and knows that the same are true. L. C. Kingsland.

Subscribed and sworn to before me this 7th day of March, 1922.

My commission expires November 13, 1923. (Seal.) N. B. Sumner, Notary Public.

[Endorsement omitted.]

41 **(MOTION OF APPELLEE, MOHRSTADT, SHERIFF,
ETC., TO DISMISS.)**

[Filed Mar. 15, 1922.]

Now comes Charles E. Mohrstadt, Sheriff of the City of St. Louis, Missouri, one of the appellees in the above-entitled cause, and appearing by Clarence T. Case, his attorney, moves the Court to dismiss the appeal filed herein and for grounds thereof says:

I.

1. That on July 20, 1921, a judgment was entered against Charles E. Mohrstadt, Sheriff, the above-named appellee, by the Circuit Court of the City of St. Louis, for the amount recovered by the said Charles E. Mohrstadt from the defendant, and which is the sum referred to in the bill of complaint in this cause, in favor of Lamar Lyndon.

2. That subsequent to the entry of the decree and order of July 31, 1921, by the District Court dismissing the bill of complaint herein, Lamar Lyndon, by proceedings duly had in the suit pending in the Circuit Court of the City of St. Louis, and mentioned in the bill of complaint herein, recovered the said sum from the appellee, Charles E. Mohrstadt, Sheriff, upon execution; that the judgment in the suit in the Circuit Court of the City of St. Louis against Charles E. Mohrstadt, Sheriff, was fully satisfied of record on August 9, 1921; and that said sum has therefore passed out of the possession and control of the appellee, Charles E. Mohrstadt, Sheriff.

3. That the questions raised upon this appeal have therefore become moot questions, as the relief sought by the appellant by the bill of complaint herein cannot be granted, because the acts sought to be enjoined have already been performed and the fund sought to be reached has passed out of the possession and control of this appellee.

42 II.

The appellee, Charles E. Mohrstadt, Sheriff, further shows that the District Court and this Court are without jurisdiction of the cause, for the reason that the bill of complaint seeks a writ of injunction to stay proceedings in a state court contrary to Sections 265 of the Judicial Code.

III.

The appellee, Charles E. Mohrstadt, Sheriff, further shows that

the District Court and this Court have no jurisdiction of the subject-matter in this suit, as against the sheriff of the City of St. Louis, for there is no diversity of citizenship as between the Sheriff of the City of St. Louis and the appellant herein, the Wagner Electric Manufacturing Company, and there is no substantial Federal question involved between appellant and this appellee.

IV.

The appellee, Charles E. Mohrstadt, Sheriff, further shows that the decree and order dismissing the bill of complaint herein and the opinion filed by the court, which was entered on July 31st, 1921, dismisses the cause for lack of jurisdiction in the District Court; that an appeal from a decree or order dismissing a bill of complaint for lack of jurisdiction is appealable directly to the Supreme Court of the United States under Section 238 of the Judicial Code, as amended by Act of January 28th, 1915, and consequently the appeal to this Court is void for lack of jurisdiction.

Wherefore, appellee, Charles E. Mohrstadt, Sheriff of the City of St. Louis, prays that the appeal herein be dismissed. Charles E. Mohrstadt, Sheriff, City of St. Louis, By Clarence T. Case, Attorney for Charles E. Mohrstadt, Sheriff of the City of St. Louis.

43 STATE OF MISSOURI,
 City of St. Louis, ss:

Clarence T. Case, being duly sworn, states that he is attorney for Charles E. Mohrstadt, Sheriff, appellee, in the above-entitled cause that he knows the facts stated in the above motion, and knows that the same are true. Clarence T. Case.

Subscribed and sworn to before me this 15th day of March, 1922. My Commission expires June 18, 1924. [Seal.] A. C. C. Schenknecht, Notary Public.

(ORDER DENYING MOTIONS TO DISMISS.)

[Filed March 30, 1922.]

Before Judges Sanborn and Dyer.

December Term, 1921.

Thursday, March 30, 1922.

This cause came on this day to be heard upon the motion of the appellee Charles E. Mohrstadt, Sheriff, etc., to dismiss the appeal and also upon the motion of the appellee Lamar Lyndon to dismiss the appeal as to himself; Mr. Clarence T. Case appearing for the appellee Mohrstadt and Mr. L. C. Kingsland appearing for the appellee Lyndon, in support of the respective motions and Mr. Charles A. Houts appearing in opposition to the same.

On consideration whereof, it is now here ordered by this Court that the said motions to dismiss be, and they are each hereby, denied, but without prejudice to renew the same at the time of the submission of this case on the merits. March 30, 1922.

44

(ORDER OF SUBMISSION.)

May Term, 1922.

Before Judges Carland, Trieber, and Munger.

Saturday, May 27, 1922.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Charles A. Houts for appellant, continued by Mr. Clarence T. Case for appellee Mohrstadt, Sheriff, and by Mr. Lawrence C. Kingsland for appellee Lyndon and concluded by Mr. Charles A. Houts for appellant.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court, the briefs of counsel filed herein and the motions to dismiss by appellees.

45

(OPINION.)

[Filed July 5, 1922.]

[Title omitted.]

Mr. Charles A. Houts (Mr. Thomas J. Cole and Mr. Albert Blair were on the brief with him), for appellant.

Mr. Lawrence C. Kingsland (Mr. John D. Rippey was on the brief with him), for appellee, Lamar Lyndon.

Mr. Clarence T. Case, for appellee, Charles E. Mohrstadt, Sheriff of the City of St. Louis, Mo.

Before Carland, Circuit Judge, and Trieber and Munger, District Judges.

TRIEBER, *District Judge*, delivered the opinion of the Court.

This is an appeal from a decree sustaining a motion to dismiss the bill of complaint and dismissing the bill with costs. The bill is very voluminous and there are a large number of assignments of error, mostly repetitions.

The facts as charged in the bill may be briefly stated as follows:

The appellant had entered into a contract with the appellee Lamar Lyndon claiming an indebtedness due him from appellant on this contract, instituted an action against it in the Circuit Court of the City of St. Louis, State of Missouri, and upon a trial to a jury recovered a verdict for the amount claimed on a peremptory direction

by the court. From this judgment it appealed to the Supreme Court of the State of Missouri, which affirmed the judgment of the lower court. Upon the filing of the mandate of the Supreme

46 Court in the Circuit Court, an execution was issued, directed and delivered to the appellee Mohrstadt, Sheriff of the City of St. Louis, who collected it, the appellant paying it to him. Thereupon this action was instituted in the District Court. The prayer of the bill is to enjoin the appellee sheriff from paying the money collected by him from the plaintiff under the execution and that plaintiff be adjudged to have this money returned to him and that the defendants, be directed to release all claims thereto.

The only substantial grounds relied on by the plaintiff for the relief are that the trial judge in the action in the State Court had no right to direct a verdict in favor of the plaintiff, as there was no evidence to warrant it and by reason thereof appellant was deprived of rights guaranteed to it by the Fourteenth Amendment. The other ground is that at the hearing of the appeal in the Supreme Court of Missouri which was had before one of the divisions of the Court, as may be done under the Constitution of that State, only two of the three members of the division were present at the oral argument, but while this appeal was under consideration, the two Justices, who heard the oral argument called in the third Justice, and it was this Justice who prepared the opinion of the court. This, it is claimed, deprives him of a right under the Fourteenth Amendment.

There are other assignments of error, but they are not of sufficient importance to require consideration. Counsel for appellant frankly stated to this court in his oral argument that he has been unable to find any authority on either of the issues of law contended for by him. This is not surprising. Although the Fourteenth Amendment to the Constitution has been invoked on almost every conceivable question, which the ingenuity of counsel could think of, it remained for counsel for appellant to invoke it upon the facts set out in its bill of complaint.

While a national court may enjoin enforcement of a judgment of a State Court, if inequitable and for fraud practiced on the court, *Marshall v. Holmes*, 141 U. S. 589 and cases following it, or when the state court was without jurisdiction of the person, or the subject matter, as in *Simon v. Southern Railway Company*, 236 U. S. 115, no court has ever held that such relief could be granted, because the state court erred in the application of the law at the trial of the cause, its jurisdiction of the parties and subject matter being 47 admitted, especially after the Supreme Court of the State, on appeal, had affirmed it. *Hartford Life Ins. Co. v. Johnson*, 268 Fed. 30, decided by this court and authorities there cited. Counsel seems to be of the opinion that *Fayerweather v. Ritch*, 195 U. S. 276, sustains his contention. The question involved in that case was whether the plea of *res judicata* set up by the defendant, under a judgment of a state court was good and the plea was held to have been properly sustained by the trial court. There is nothing in the opinion in that case in any wise affecting the issues involved in the instant case.

That the opinion of the Supreme Court on the appeal was prepared by a member of the court, who did not hear the oral argument, is equally without merit. Assuming that the third judge should not have participated in the decision, a question unnecessary to determine, still, as the two judges who heard the argument concurred in the result, it is as much their opinion as that of the judge who prepared it. The two judges constituted a quorum of the court and may, under the Constitution of Missouri, decide appeals with the same effect as if all the judges had heard the oral argument and decided the appeal.

As the appeal was submitted to the Supreme Court on briefs as well as oral argument, the third judge had the benefit of the briefs and appellant's arguments.

The conclusion reached makes it unnecessary to determine whether a court of the United States may grant an injunction against a sheriff involving property in his possession, seized under an execution of a valid judgment, valid on its face, which is admitted to be the property of the defendant in execution and by him paid or delivered to the sheriff. But see *Association v. Hurst*, 59 Fed. 1, 7 C. C. A. 598 (6th Circuit); *National Surety Co. v. State Bank*, 120 Fed. 593, 56 C. C. A. 657 (8th Circuit); *United States v. Morris*, 262 Fed. 514.

The decree is Affirmed.

Filed July 5, 1922.

48

(DECREE.)

[Filed July 7, 1922.]

[Title omitted.]

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be and the same is hereby, affirmed with costs; and that Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, have and recover against the Wagner Electric Manufacturing Company the sum of twenty dollars for their costs herein and have execution therefor. July 7, 1922.

49 **PETITION OF WAGNER ELECTRIC MANUFACTURING COMPANY FOR A REHEARING.**

[Filed Sept. 2, 1922.]

[Title omitted.]

Now comes the Wagner Electric Manufacturing Company, by its solicitors and counsel, and files this, its petition for a rehearing of this cause, in which decree was entered on the seventh day of July, 1922, and prays that a rehearing before a full court be ordered. This prayer is based upon the reasons set forth in the following argument:

50 Appellant based its suit on three violations of the Due Process Clause of the Fourteenth Amendment, to wit:

(a) The action of the trial judge in the State Court in the suit of Appellee v. Appellant in giving to the jury a peremptory instruction to find for the plaintiff, the burden of proof under the pleadings in that suit being upon the plaintiff.

(b) The action of Division No. 1 of the Supreme Court of Missouri in permitting one of its members, who was not present when the oral argument in behalf of appellant was made before that Division, to take part in the decision of the controversy;

(c) The refusal of Division No. 1 to transfer the suit to the Court en banc when requested thereto by appellant upon the ground that at that time there was involved in the controversy a Federal question as contemplated by Section 4 of the Amendment of 1890 of the Constitution of Missouri.

Appellant, in its bill and its printed arguments, contended that each of the three foregoing complaints were sustained by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. As to the first two complaints this Court, in its opinion, disallowed them, and briefly states its reasons therefor. But as to the third complaint, the Court had nothing to say whatever.

The Court, in its opinion, made the following comment:

51 "Although the Fourteenth Amendment to the Constitution has been invoked in almost every conceivable question which the ingenuity of counsel could think of, it remained for counsel for appellant to invoke it upon the facts set out in its bill of complaint."

The Judge appears to credit counsel with the utmost ingenuity in finding in the facts of this case grounds for a cause of action based upon the Due Process Clause of the Fourteenth Amendment. Counsel disclaim ingenuity in the matter.

The First Ground of Complaint.

The first cause of complaint was so obvious and immediate that no dialectic skill nor refinement of reasoning would be required for

the defendant in a suit as simple as this was, to perceive that he had not had a fair trial when the Judge did not allow the jury to pass upon the question of his liability—it being a case where, under the pleadings, the burden of proof was on the plaintiff. The State Constitution specifically provides that the trial by jury shall remain inviolate (Art. II, Sec. 28 of the Constitution of the State of Missouri).

In disposing of this ground the Court said:

"No court has ever held that such relief could be granted, because the State Court erred in the application of the law at the trial of the cause, its jurisdiction of the parties and subject matter being admitted, especially after the Supreme Court of the state, on appeal, had affirmed it."

The Court failed to perceive that the misconduct of the trial judge was not simply making an erroneous ruling of law, but his wrongful act was to deprive the defendant of his constitutional right to have the jury pass on all the evidence. The act complained of lay outside of the zone of judicial discretion. The Judge had no more right to give the peremptory instruction under the circumstances than he would have to instruct the jury in favor of plaintiff before the receipt of any testimony whatever. If this view is incorrect will not this Court state wherein it is erroneous?

Counsel is thoroughly advised that ordinary "judicial error," error committed by the Court upon questions properly coming before the Court for decision, which may be styled "functional error," whether committed at nisi prius or on appeal, is not ground for complaint under the Fourteenth Amendment. But in matters of procedure, whether at nisi prius or on appeal, in which the Judge has no discretion, a departure from the established practice, if injurious, is a violation of the Due Process Clause of the Fourteenth Amendment.

Windsor v. McVeigh, 93 U. S. 274;

Hovey v. Elliott, 167 U. S. 409.

The approval by a State Supreme Court of such misconduct of a nisi prius Judge will not legalize it; indeed, the error may occur in the Supreme Court of the state. More than that, a ruling may be made for the first time in the Supreme Court of the state, and one that may be fair and correct in ordinary cases, but in exceptional cases may work hardship upon one of the parties, and for that reason may be a violation of the due-process clause. An instance of that kind occurred in the case of *Saunders v. Shaw*, 244 U. S. 317.

53

The Second Ground of Complaint.

The opinion of this Court shows that the Court considered the second ground of our complaint and held it to be unsound. The Court was of the opinion that if the fourth member of Division No. 1 was absent at the time the oral argument was made before the division, but that such judge, after he returned and had read the printed argument, became qualified to participate in the decision,

and it was not improper for him to take part in the case. Counsel still insists that the objection is a valid one, but will not repeat his former arguments, except again to refer to the action of the Supreme Court of the United States and some other courts in situations of a similar character.

In the case of *Knoxville Water Company v. Knoxville*, 189 U. S. 434, three Judges of the Supreme Court (Justices White, McKenna and Day) were not present at the oral argument, but it was noted, also, "they took no part in the decision of the case," although they had no doubt had an opportunity to read the printed argument.

In the case of *Lott v. Pittman*, 243 U. S. 386, an appeal from the Supreme Court of Georgia, it appears that the argument was heard by three of the six Judges composing the Georgia Court, but that the decision was made by all six. Upon complaint of that conduct being made, the Supreme Court of Georgia gave notice of its willingness to grant a rehearing—a fact which the Supreme Court of the United States mentioned with approval. In the case of *Imboden v. Trust Company*, 155 Mo. App. 450, 452, in the St. Louis Court of

Appeals, Judge Nortoni, a new Judge, who had not heard
 54 the oral argument, wrote the opinion. Upon dissatisfaction being expressed, a rehearing was granted.

The Third Ground of Complaint.

The Court erred in refusing to find and declare that the action of Division No. 1 of the Supreme Court of Missouri in refusing to transfer the suit of appellee v. appellant to the court en banc as and when requested by appellant, was a violation of the due-process clause of the Fourteenth Amendment of the Constitution of the United States. In support of that contention appellant submits the following propositions of law:

First. The primary requirements as to judicial procedure to be observed by the state courts in Missouri are those prescribed by the Constitution and statutes of the state. There are other requirements based on the "law of the land"—common law, but the statutory ones are the ones here intended.

Second. A failure to observe any of these constitutes a violation of the due process as contemplated by the due-process clause of the Fourteenth Amendment of the Constitution of the United States.

Third. Under the Amendment of 1890 of the Constitution of the State of Missouri, the Supreme Court of the state was divided into two divisions, Division No. 1 consisting of four Judges, and Division No. 2 consisting of three Judges, and it was further provided in section 4 of that amendment that whenever there shall be pending in either division a cause in which a federal question shall be involved, the cause shall be transferred to the court en banc.

55 Fourth. In any cause pending before a division of the Supreme Court of Missouri, in which a federal question is involved, and where an application has been made in such cause by one of the parties thereto to have such cause transferred to the court en banc because of the pendency of such federal question, and the

Court has refused to order the transfer, such refusal constitutes a violation of the Due-Process Clause (Section 30) of the Constitution of the State of Missouri, and at the same time constitutes a violation of the Due-Process Clause of the Fourteenth Amendment to the Federal Constitution.

The foregoing four propositions in support of the third ground of complaint probably will be admitted to be correct; if so, the argument is limited to the question whether at the time counsel asked Division No. 1 to transfer the cause to the Supreme Court there was involved in the controversy a Federal question.

Appellant contends that a Federal question arose when the appellant objected to the manner in which Division No. 1 had disposed of appellant's appeal, in this, to wit, that it permitted a Judge who had not heard the oral argument to participate in a decision of the case—a laxity of procedure which appellant claims was a violation of due process, and the pendency of that contention injected into the case a Federal question. The question is not whether the division committed an error in allowing the fourth Judge to participate, but "Was there involved in the controversy at that time a Federal question?" If a Federal question was involved, then it was the duty of the judges composing Division No. 1 to transfer the case to the court en banc. The fact that the fourth Judge participated in
56 the decision is admitted.

Whether it was or was not an impropriety constitutes a question upon which fair-minded men may differ. Lawyers and judges can be found everywhere who will express their disapproval of that practice. That such question was actually involved in the case of *Lyndon v. Wagner Company*, pending in Division No. 1 at the time of the motion to transfer was made, ought not to be disputed. The pendency of that question and its effect under the Fourteenth Amendment gave it the qualities of a Federal question. If there was involved a Federal question in the controversy, pending before Division No. 1 of the Supreme Court of Missouri, then the case should have been transferred to the court en banc as directed by Section 4 of the amendment of 1890 to the Constitution of the State of Missouri, and as requested to by appellant. The refusal of the division to make the transfer constituted a violation of the due-process clause, not only of the State of Missouri, but of the Fourteenth Amendment of the United States.

Counsel begs leave to reiterate the suggestion made in his printed brief (page 23) respecting the motives of public policy that manifestly actuated the framers of the Constitutional Amendment of 1890 in inserting the specific requirement set forth in Section 4 as to how a Federal question should be tried.

The existence of a Federal question in a suit might bring a conflict between a state tribunal and a Federal tribunal or the officers thereof. For that reason the framers of the amendment decided it prudent to require a decision on the question by seven Judges rather than by the three or four judges composing a division—manifestly
57 on the assumption that a tribunal of seven Judges will be less likely to err than one of three or four Judges. It follows that when a Federal question arises in a case pending in a

division, it is incumbent upon that division not to decide it, but to transfer it to the court en banc.

That Division No. 1 refused to transfer the case to the court en banc must be admitted. By such refusal it violated a step of the judicial procedure specifically required by Section 4 of the Constitutional Amendment of 1890, to wit, a transfer to the court en banc. That requirement is based on the fact that the suit involves a Federal question—a fact not disputed in this case. The only other question remaining is, did Division No. 1 have jurisdiction to decide whether such Federal question was involved or not? We say it did not. To say that it could be done would make it possible in some instances for a party to be deprived of the privilege of having his case heard by the court en banc. Consideration of public policy as pointed out in our printed argument (page 25) would be against any such view. A similar predicament has arisen where there is a constitutional question pending before a Missouri Court of Appeals—an intermediate court in the Missouri system of courts, as shown in our printed argument, page —. The policy of the Supreme Court of Missouri is that the Court of Appeals should transfer the case and not decide it.

The Supreme Court of the United States has hitherto refrained from giving a comprehensive definition of the term, "due process of law," as contemplated by the Fourteenth Amendment. The

58 tribunal has gone so far as to specify four of the essential elements or conditions constituting due process, to wit:

1. Jurisdiction of the subject matter.
2. Notice to defendant.

3. Opportunity to be heard; and these three are specific requirements. The only other condition mentioned is that the Court must not in deciding a case act "arbitrarily" (*McGovern v. New York*, 227 U. S. 363). This requirement is somewhat vague. Nowhere is it officially stated what is meant by the term "arbitrarily." We venture to suggest that in deciding a vital point the judge must not be governed solely by inclination, and thereby ignore established precepts to the contrary.

At the outset of this controversy counsel were well aware of the admonition given to lawyers by Mr. Justice Miller of the United States Supreme Court in the case of *Davidson v. New Orleans*, 134 U. S. 97, forty-five years ago, in which the Justice commented on the great number of due process cases "then crowding the docket of this court," and said: "There exists in the minds of the lawyers some strange misconception of the scope of the amendment." To avoid any such error, counsel proceeded to give to the subject a thorough and extensive study. Over three hundred decisions of the Supreme Court of the United States, and twenty decisions of the Court of Appeals of the Eighth District, were examined, digested and classified. Further, counsel sought by ample preparation to be able to suggest essential conditions, limitations and other criteria by which any suit on the due-process clause might be tested and thereby approved or rejected. Accordingly, counsel prepared and inserted in his printed argument a chapter entitled, "Due

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Process of Law Under the Fourteenth Amendment—Its Principles and Limitations.” This was done in the hope that it would elicit some measure of instructive discussion of the whole subject from this Court, but in this respect we have been disappointed. Owing to the fact that there were filed two separate printed arguments in behalf of the appellant, the Judge who wrote the opinion may have unknowingly failed to read the one in which this point was discussed.

Conventionally, the Judges know the law upon a given point better than the counsel know it. It is, however, the privilege and duty on the part of the latter to aid the Court in the solution of doubtful points, but there is one duty which counsel cannot slight, and that is, his duty to his client. In the discharge of that duty he should put forth his best efforts in a candid and respectful manner, advocating what he believes to be a correct solution of the case.

In consideration of the foregoing, we respectfully ask for a rehearing of the case. Respectfully submitted, Thos. J. Cole, Charles A. Houts, Albert Blair.

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Certificate of Counsel.

The undersigned solicitors and counsel for Wagner Electric Manufacturing Company, petitioner, certify: That they are familiar with the record in this case; that they have read this petition; that the same, in their opinion, is undoubtedly well founded in fact and in law; and that this petition is presented in good faith and not for purposes of delay. Thos. J. Cole, Charles A. Houts, Albert Blair, Solicitors and Counsel for the Wagner Electric Manufacturing Company, Petitioner.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 2, 1922.

61 (ORDER DENYING PETITION FOR REHEARING.)

[Filed Sept. 18, 1922.]

September Term, 1922.

Monday, September 18, 1922.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellant.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied. September 18, 1922.

(PETITION FOR APPEAL TO SUPREME COURT U. S. AND ORDER ALLOWING SAME.)

Comes now the above named appellant, Wagner Electric Manufacturing Company, and feeling itself aggrieved by the decree

entered on the 7th of July, 1922 (petition for re-hearing having been duly filed and overruled on September 18th, 1922), in the above entitled proceeding, doth hereby appeal from said decree to the Supreme Court of the United States, and prays that this, its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was entered, duly authenticated, may be sent to the Supreme Court of the United States. Charles A. Houts, Albert Blair, and Thos. J. Cole, Attorneys for Plaintiff and Appellant Wagner Electric Manufacturing Company. St. Louis, December 4, 1922.

Now, to wit on December 11th, 1922 it is ordered that the appeal be allowed as prayed for. Walter H. Sanborn, Judge United States Circuit Court of Appeals for the Eighth Circuit.

62 **(ASSIGNMENT OF ERRORS ON APPEAL TO
SUPREME COURT U. S.)**

[Filed Dec. 11, 1922.]

And now comes the Wagner Electric Manufacturing Company, appellant, and makes and files this, its Assignment of Errors upon which it will rely, in prosecuting the appeal herein from the judgment rendered in conformity with the opinion of the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

1. The said Circuit Court of Appeals erred in holding and deciding that the action of the trial Judge (in the Circuit Court of the City of St. Louis, Missouri), in directing a verdict in favor of the plaintiff in the trial court, Lamar Lyndon, in the absence of evidence to warrant such action or such verdict, did not deprive appellant herein of rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

2. The Circuit Court of Appeals erred in holding that the direction of the verdict, as described in paragraph 1, supra, was a mere error in the application of the law at the trial of the case.

3. The Circuit Court of Appeals erred in holding that appellant's complaint, that it was deprived of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it was not allowed to orally present and argue the case before all of the judges who participated in the decision, was without merit. This is especially true in view of the fact that the judge who wrote the opinion was absent from the oral argument.

63 4. The Circuit Court of Appeals erred in refusing to find and declare that the action of Division Number One of the Supreme Court of Missouri, in refusing to transfer the suit of Appellee v. Appellant to the Court en Banc, as and when requested by appellant, was in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, because there was a federal question involved, and under the amendment of 1890 to the Missouri Constitution, such cases were required to be transferred to the Court en banc. Charles A. Houts, Albert Blair, and

Thos. J. Cole, Attorneys for Appellant, Wagner Electric Manufacturing Company.

(BOND ON APPEAL TO SUPREME COURT U. S.)

[Filed Dec. 11, 1922.]

Know all men by these presents:

That we, Wagner Electric Manufacturing Company, Principal and Massachusetts Bonding & Insurance Company, Surety are held and firmly bound unto Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, in the full and just sum of Five Hundred and 00/100 Dollars, to be paid to the said Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, their heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals, and dated this — day of December in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at the May, 1922, Term of the United States Circuit Court of Appeals for the Eighth Circuit, in a suit depending in said Court between Wagner Electric Manufacturing Company, plaintiff, and Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, defendants, judgment was rendered against the said Wagner Electric Manufacturing Company, and the said Wagner Electric Manufacturing Company has obtained an appeal to the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis, citing and admonishing them to be and appear before the Supreme Court of the United States, at the City of Washington, District of Columbia, thirty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Wagner Electric Manufacturing Company shall prosecute said appeal to effect, and answer all costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue. Wagner Electric Manufacturing Company, Principal, V. W. Bergenthol, Its Asst. Treas. [Seal.] Massachusetts Bonding & Insurance Company, Surety, By William D. Hemenway, Assistant Vice President. Attest: John J. Henschke, Resident Assistant Secretary.

Approved by Walter H. Sanborn.

UNITED STATES OF AMERICA, ss:

Lamar Lyndon and Charles E. Mohrstadt, sheriff of the city of St. Louis, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington District of Columbia, on the 10th day of January, 1923, pursuant to an appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the Wagner Electric Manufacturing Company is appellant, and Lamar Lyndon and Charles E. Mohrstadt, Sheriff of the City of St. Louis are respondents, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Walter H. Sanborn, Senior U. S. Circuit Judge this 11th day of December, in the year of Our Lord One Thousand Nine Hundred and Twenty-two. Walter H. Sanborn, Judge United States Circuit Court of Appeals for the Eighth Circuit.

Service of the above citation *if* hereby acknowledged this 12th day of December, 1922. Rippey & Kingsland, Attorney- for Lamar Lyndon. Clarence T. Case, Attorney for Charles E. Mohrstadt, Sheriff of the City of St. Louis.

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. No. 5999. Wagner Electric Manufacturing Company, Appellant, vs. Lamar Lyndon, et al., etc. Citation on appeal to Supreme Court U. S., and acknowledgment of service. Filed Dec. 12, 1922. E. E. Koch, Clerk.

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(CLERK'S CERTIFICATE.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the Wagner Electric Manufacturing Company was Appellant, and Lamar Lyndon, et al., were Appellees, No. 5999, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the fourth day of October, A. D. 1922, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Eastern District of Missouri.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirteenth day of December, A. D. 1922. [Seal of United States Circuit Court of Appeals, Eighth Circuit.] E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 29,288. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 738. Wagner Electric Manufacturing Company, appellant, vs. Lamar Lyndon and Charles E. Mohrstadt, sheriff of the city of St. Louis. Filed December 16th, 1922. File No. 29,288.

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